No. 14-990

In the Supreme Court of the United States

STEPHEN M. SHAPIRO,
O. JOHN BENISEK, AND MARIA B. PYCHA

Petitioners,

v.

DAVID J. MCMANUS, JR., CHAIRMAN,
MARYLAND STATE BOARD OF ELECTIONS; AND
LINDA H. LAMONE, STATE ADMINISTRATOR OF ELECTIONS

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

May a single-judge district court determine that three judges are not required to hear an action that is otherwise covered by 28 U.S.C. § 2284(a) on the ground that the complaint fails to state a claim under Rule 12(b)(6)?

PARTIES TO THE PROCEEDINGS

This action was originally filed against Bobbie S. Mack, in her official capacity as chair of the State Board of Elections; and Linda S. Lamone, in her official capacity as State Administrator of Elections.

During the pendency of this action, Ms. Mack was succeeded by David J. McManus, Jr. as chair of the State Board of Elections. Pursuant to this Court's Rule 35.3, Mr. McManus is "is automatically substituted as a party" for Ms. Mack.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 584 F. App'x 140. The district court's order granting respondents' motion to dismiss (Pet. App. 3a-21a) is reported at 11 F. Supp. 3d 516.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 2014. A timely petition for rehearing and rehearing en banc was denied on November 12, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Three-Judge Court Act, 28 U.S.C. § 2284, provides in relevant part:

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented,

shall serve as members of the court to hear and determine the action or proceeding.

* * *

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

STATEMENT

This case presents the question whether a single-judge district court may determine that three judges are not required in an action otherwise covered by the Three-Judge Court Act, on the ground that the complaint fails to state a claim under Rule 12(b)(6). The Fourth Circuit, in *Duckworth* v. *State Administrative Board of Election Laws*, 332 F.3d 769 (2003), answered that question affirmatively, but without explanation. That answer is wrong in every conceivable respect: It offends the statutory text, upsets the statutory scheme, ignores the rule against complex jurisdictional tests, and undermines the Act's settled purposes. It should

not stand. Because petitioners' First Amendment claim is not obviously frivolous, this Court should vacate the judgments of the lower courts and remand the case with instructions to refer this entire action to a district court of three judges.

A. Statutory background

1. The original Three-Judge Court Act

a. In *Ex parte Young*, 209 U.S. 123 (1908), this Court held that federal district courts may prospectively enjoin state officials from enforcing unconstitutional statutes. Prior to then, the district courts "had occasionally issued injunctions at the behest of private litigants against state officials to prevent the enforcement of state statutes, but such cases were rare and generally of a character that did not offend important state policies." *Swift & Co.* v. *Wickham*, 382 U.S. 111, 117 (1965). Thus, "[a] 'storm of controversy' raged in the wake of *Ex parte Young*, focusing principally on the power of a single federal judge to grant ex parte interlocutory injunctions" that single-handedly disrupted the operation of duly-enacted state laws. *Steffel* v. *Thompson*, 415 U.S. 452, 465 (1974).

Congress responded in 1910 with the Three-Judge Court Act. As originally enacted, the statute provided that "no interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State" could issue "upon the ground of the unconstitutionality of such statute," unless the application was "presented to a justice of the Supreme Court of the United States or to a circuit judge" and "heard and determined by three judges." See Act of June 18, 1910, ch. 309, § 17, 36 Stat. 539, 557. The Act provided further that "[a]n appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and

hearing, an interlocutory injunction in such case." *Ibid.* Congress soon thereafter amended the statute to cover applications for permanent injunctions, as well. See Act of Feb. 13, 1925, ch. 299, § 238, 43 Stat. 936, 938.

With the Three-Judge Court Act, Congress sought to achieve two well-recognized goals: ensuring greater and more careful deliberation, and speeding final resolution of the case.

First, Congress intended to relieve the public's unease with placing in the hands of a single federal judge the authority to decide injunctions against the enforcement of duly-enacted state laws. *Swift*, 382 U.S. at 118. Not only do three judges speak with greater authority and "dignity" than a single judge (David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 7 (1964)), but the procedure "allow[s] a more authoritative determination and less opportunity for individual predilection in sensitive and politically emotional areas." *Swift*, 382 U.S. at 119. Thus, the Three-Judge Court Act "thr[e]w additional safeguards around the exercise of the enormous power" recognized in *Ex parte Young* and helped avoid "irresponsible" decisionmaking by single judges. 42 Cong. Rec. 4852, 4853 (1908) (statement of Sen. Bacon).

Second, Congress recognized that the "far reaching importance" of certain cases meant "that every reasonable means should be provided for speeding the litigation." 36 Cong. Rec. 1679 (1903) (statement of Sen. Fairbanks) (debate concerning three-judge review in antitrust cases). Thus, Congress "sought to minimize the delay incident to a review upon appeal from an order granting or denying an interlocutory injunction" (*Stratton* v. *St. Louis Sw. Ry.*, 282 U.S. 10, 14 (1930)) by "authoriz[ing] direct review by this Court" and

thereby "accelerating a final determination on the merits" (*Swift*, 382 U.S. at 119).

Congress in 1937 extended the three-judge court procedure to apply to requests for injunctions against enforcement of federal laws, as well. See Act of Aug. 24, 1937, ch. 754, § 2, 50 Stat. 751, 752. The purpose underlying that expansion paralleled the justifications for the original enactment: Requiring three judges would both ensure more careful decisionmaking (81 Cong. Rec. 7045 (1937) (statement of Sen. O'Mahoney)) and "expedite decision of important cases" by providing "for direct appeals to the Supreme Court" (Currie, *supra*, at 11 (citing 81 Cong. Rec. 3153, 3254, 3255, 3268, 3273 (1937) (Statements of Rep. Michener, Rep. Sumners, and Rep. Chandler); H.R. Rep. No. 212, 75th Cong., 1st Sess. 1, 7 (1937)).

b. In 1948, Congress consolidated the scattered provisions of the Act, creating the precursor version of Section 2284, which is the subject of this appeal. See Act of June 25, 1948, ch. 646, 62 Stat. 869, 928.

As of 1948, the Three-Judge Court Act provided that injunctions against the enforcement of either state or federal statutes on the ground of repugnance to the Constitution "shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." 28 U.S.C. §§ 2281, 2282 (1952). Section 2284, in turn, provided that in cases "required" to be heard by three judges, initial applications for relief were to be presented to a single district judge who, upon "the filing of the application * * * shall immediately notify the chief judge of the circuit, who shall designate two other judges" to "serve as members of the court to hear and determine the action or proceeding." 28 U.S.C. § 2284(1) (1952).

Section 2284 further permitted any single judge sitting on the three-judge panel to enter "all orders required or permitted by the rules of civil procedure," but forbade any single judge from "dismiss[ing] the action" or "enter[ing] a summary or final judgment." 28 U.S.C. § 2284(5) (1952).[1]

As part of the 1948 consolidation, Congress separately codified Section 1253, which provided (and still provides today) that "any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. § 1253 (1952).

2. The present-day statute

a. Following passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the far-reaching scope of the Three-Judge Court Act soon became untenable. By the early 1970s, more than 300 three-judge district courts were being convened each year. See Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. Mich. J.L. Reform 79, 91 tbl. 1 (1996). This Court was deciding appeals in nearly all of those cases, including more than fifty per Term after full briefing and argument, comprising nearly one third of the Court's plenary docket. *Id.* at 107 & tbl. 2.

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[1] Because the Three-Judge Court Act permits single judges who are members of the three-judge court to hold certain hearings and decide certain issues unilaterally, we distinguish in this brief between the actions of a "single judge" (which take place after a three-judge court has been convened) and the actions of a "single-judge district court" (which take place before a three-judge court has been convened).

Beyond that, there was concern that, with the oversized volume of three-judge cases, the appellate process for determining when three judges are required had begun to undermine the purposes of the Act. This Court held early in the history of the Three-Judge Court Act that the statute "does not require three judges to pass upon [the] initial question of jurisdiction." *Ex parte Poresky*, 290 U.S. 30, 32 (1933) (per curiam). Thus, the single judge to whom an application for injunctive relief was presented could decide that "[a] three-judge court is not required [because] the district court itself lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts." *Gonzalez* v. *Automatic Emp. Credit Union*, 419 U.S. 90, 100 (1974).

One ground for finding that the court lacked jurisdiction was that the constitutional claims presented were insubstantial: "Section 2281 does not require a three-judge court when the claim that a statute is unconstitutional is wholly insubstantial" or "legally speaking nonexistent." *Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962) (per curiam). Accord *McLucas* v. *DeChamplain*, 421 U.S. 21, 28 (1975) ("general subject-matter jurisdiction is lacking when the claim of unconstitutionality is insubstantial."). "A claim is insubstantial" in the jurisdictional sense "only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973) (quoting *Poresky*, 290 U.S. at 32).

The substantiality rule created a jurisdictional complication: While appeals from judgments in cases heard by three-judge courts lie with this Court in the first instance under Section 1253, this Court had held

that "dismissal[s] of a complaint by a single judge" on the ground that a three-judge court is not required are "reviewable in the court of appeals." *Gonzalez*, 419 U.S. at 100. Thus, "courts of appeals [were] brought into the picture [only] to determine whether or not the single judge has improperly failed to call a court," and in the event of a reversal, "the case [would go] back down to the district court where * * * the case starts all over again." *Three-Judge Court and Six-Person Jury: Hearing on S. 271 and H.R. 8285 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 93rd Cong. 5 (1973-1974) (testimony of Hon. J. Skelly Wright, Chairman, Judicial Conference Comm. on Fed. Jurisdiction).

A consensus developed that the threshold issue of determining when a three-judge court is required often "generate[ed], rather than lessen[ed], litigation," and that reducing its incidence "would increase the efficiency of our judicial system" by avoiding "duplicative" appeals. S. Rep. No. 94-204, at 7 (1976).

b. In 1976, in response to widespread calls for reform (see Michael E. Solimine, *Congress, Ex Parte Young, and the Fate of the Three-Judge District Court*, 70 U. Pitt. L. Rev. 101, 139-142 (2008)), Congress substantially narrowed, but did not entirely repeal, the Three-Judge Court Act. See Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 119 (28 U.S.C. § 2284).

Two changes in the present-day statute are notable in comparison with the version of the Act that prevailed for most of the twentieth century.

First, the Three-Judge Court Act no longer applies to all requests for injunctions against the enforcement of state and federal statutes on constitutional grounds. Instead, the three-judge procedure applies only "when an action is filed challenging the constitutionality of

the apportionment of congressional districts or the apportionment of any statewide legislative body" and "when otherwise required by Act of Congress." 28 U.S.C. § 2284(a) (2012).

Congress elected to retain the procedure for cases challenging state and federal redistricting for each of the two reasons that explained the original enactment in 1910: such cases are tremendously important and therefore call for both the careful deliberation of three judges and speedy resolution by direct appeal to this Court. See, *e.g.*, S. Rep. No. 94-204, at 9 (1976); 119 Cong. Rec. 666 (1973) (statement of Sen. Burdick).

Indeed, even the most outspoken opponents of three-judge district courts, including Judge Henry Friendly, agreed that, because reapportionment cases are so exceptionally important, "[i]t is more acceptable if such cases are heard by a court whose members include adherents of more than one political party," and the speedy resolution of such challenges is "better accomplished by leaving out the court of appeals as an intermediary that has to be pierced." *Diversity Jurisdiction, Multi-Party Litig., and Choice of Law in the Fed. Courts: Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 92d Cong. 167, 749 (1971) (testimony of Hon. Henry Friendly). Accord *id.* at 784 (testimony of Hon. J. Skelly Wright).

Second, the Act codifies the practice by which single-judge courts decide whether or not three-judge courts are "required." 28 U.S.C. § 2284(b)(1) (2012). The 1948 version of the law had likewise provided that single-judge courts should refer only those actions "required" to be heard by three-judge courts. 28 U.S.C. § 2284 (1970). See also 28 U.S.C. § 1253. But under that provision, the filing of a complaint seeking injunc-

tive relief was itself the trigger for convening a three-judge court; thus, the single judge's obligation to "immediately" convene a three-judge court commenced from the outset of the litigation, without expressly leaving room for the judge to determine whether or not three-judges were, in fact, "required." *Ibid.* Under the amended law, a plaintiff who files an action falling within the scope of Section 2284 must submit an express "request for three judges," in response to which the single judge must expressly "determine[if] three judges are not required." 28 U.S.C. § 2284(b)(1) (2012).

B. Factual background

On October 20, 2011, the Maryland General Assembly enacted Senate Bill 1, establishing the State's congressional districting plan, which Governor Martin O'Malley signed into law the same day. The plan establishes the districts for the election of Maryland's eight representatives in the United States House of Representatives and will remain in effect until after the next census in 2020. The districting plan describes each district by identifying the counties, election districts, precincts, and census block designations for the areas that are included in each district. A copy of the redistricting map is reproduced on page 23a of the petition appendix.

The redistricting plan substantially reconfigures Maryland's congressional districts. According to an analysis by *The Washington Post*, more than one-in-four Marylanders were shuffled from one district to another. See *Gerrymandered? Maryland voters to decide*, Wash. Post (Sept. 27, 2012), perma.cc/CL96-PT25 (reporting that "the plan will give at least 1.6 million people a different representative in Congress"). Several districts (including the fourth and seventh districts) feature narrow, meandering ribbons linking

together geographically, demographically, and politically disparate regions. The sixth district connects the mountainous, westernmost region of the state with densely populated suburbs of Washington, D.C. As District Judge Titus explained in his concurring opinion in *Fletcher* v. *Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), linking these regions brings together a group of voters "who have an interest in farming, mining, tourism, paper production, and the hunting of bears * * * with voters who abhor the hunting of bears and do not know what a coal mine or paper mill even looks like." *Id.* at 906.

Maryland's plan is widely recognized as the most gerrymandered in the Nation. See Mike Maciag, *Which States, Districts Are Most Gerrymandered?*, Governing (Oct. 25, 2012), perma.cc/82PD-XBRX; Christopher Ingraham, *America's most gerrymandered congressional districts*, Wash. Post (May 15, 2014), perma.cc/WWP9-454G. Judge Paul Niemeyer aptly described Maryland's Third Congressional District as "reminiscent of a broken-winged pterodactyl, lying prostrate across the center of the State." *Fletcher*, 831 F. Supp. 2d at 902 n.5. And as one editorial put it, "the map has been sliced, diced, shuffled and shattered, making districts resemble studies in cubism." Editorial Board, *Md. redistricting maps are comic and controversial*, Wash. Post (Oct. 29, 2011), perma.cc/KF9V-JCSZ.

The result, according to the amended complaint, is an "abridgement of representational, voting, and association rights." Opp. App. 31 (¶ 5).

C. Procedural background

1. Petitioners, who are a bipartisan group of concerned Marylanders, filed a pro se complaint in the District Court for the District of Maryland, challenging the constitutionality of Maryland's redistricting plan.

As relevant here, petitioners alleged that the plan burdens their First Amendment rights "along the lines suggested by Justice Kennedy in his concurrence in *Vieth* [v. *Jubelirer*, 541 U.S. 267 (2004)]." Opp. App. 44 (¶ 23). See also *id.* at 29 (¶ 2) (map violates "First Amendment rights of political association"); *id.* at 31 (¶ 5) ("the structure and composition of the abridged sections constitute infringement of First Amendment rights of political association"). According to Justice Kennedy's concurrence in *Vieth*, a political gerrymander may "impose burdens and restrictions on groups or persons by reason of their views," which "would likely be a First Amendment violation, unless the State shows some compelling interest." 541 U.S. at 315.

Petitioners also expressly requested the convening of a three-judge court. Opp. App. 31 (¶ 6).

2. Judge Bredar dismissed the case without referring the matter to a three-judge court. Pet. App. 3a-21a. He "recognize[d] that some early cases appear to eschew the traditional 12(b)(6) standard in favor of one that looks to whether a plaintiff's complaint sets forth a 'substantial question.'" *Id.* at 7a. But, Judge Bredar explained, "in the present context, the 'substantial question' standard and the legal sufficiency standard are one and the same" because, "where a plaintiff's 'pleadings do not state a claim, then by definition they are insubstantial and so properly are subject to dismissal by the district court without convening a three-judge court.'" *Id.* at 7a-8a (quoting *Duckworth*, 332 F.3d at 772-773).

Judge Bredar therefore "appl[ied] the usual Rule 12(b)(6) standard in deciding th[e] motion" (Pet. App. 8a) and dismissed petitioners' First Amendment claim on the merits (*id.* at 20a-21a).

Judge Bredar was "not insensitive to Plaintiffs' contention that Maryland's districts as they are currently drawn work an unfairness" and recognized that "[i]t may well be that the 4th, 6th, 7th, and 8th congressional districts, which are at issue in this case, fail to provide 'fair and effective representation for all citizens.'" Pet. App. 19a-20a (quoting *Reynolds* v. *Sims*, 377 U.S. 533, 565-568 (1964)). He nevertheless rejected petitioners' First Amendment claim, concluding, without citing any of this Court's precedents, that the claim "is not one for which relief can be granted." Pet. App. 21a. That is so, Judge Bredar concluded, because "nothing about the congressional districts at issue in this case affects in any proscribed way Plaintiffs' ability to participate in the political debate." *Id.* at 20a (internal quotation marks and alteration marks omitted). Petitioners "are free," he continued, "to join pre-existing political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives." *Id.* at 21a (internal quotation marks omitted). On that basis, Judge Bredar dismissed the claim on the merits, refusing to convene a three-judge court. *Ibid.*

3. The court of appeals summarily affirmed (Pet. App. 1a-2a) and denied petitioners' request for rehearing and rehearing en banc (*id.* at 22a).

SUMMARY OF THE ARGUMENT

May a single-judge district court determine that three judges are not required to hear an action that is otherwise covered by 28 U.S.C. § 2284(a) on the ground that the complaint fails to state a claim under Rule 12(b)(6)? The Fourth Circuit—standing alone among the lower courts—has answered that question affirmatively, and without a word of explanation. Every relevant consideration indicates that the Fourth

Circuit's answer is wrong, and that this case should have been referred to a three-judge court.

A. 1. The statutory text provides that a three-judge district court "shall" be convened in any case presenting a constitutional challenge to congressional redistricting. Although that language is, on its face, mandatory, this Court long ago held that a single-judge court could determine that three judges are "not required" if the court lacked jurisdiction over the suit. One ground for determining that jurisdiction is lacking is that the complaint's claims are wholly insubstantial—meaning that they are "inescapably foreclosed" by this Court's precedents. That is an extremely narrow standard; when a complaint's claims are weak but arguable, the dismissal cannot be for lack of jurisdiction; rather, it entails judgment on the merits, after the court has *assumed* jurisdiction.

It was against that backdrop that Congress, in 1976, amended the Three-Judge Court Act, expressly codifying the single-judge district court's long-recognized power to "determine[] that three judges are not required." 28 U.S.C. § 2284(b)(1). Those words necessarily reflect the meaning ascribed to them by the precedents from which they were taken. And those precedents—which repeatedly recognize the difference between dismissal for want of jurisdiction and dismissal on the merits—foreclose the Fourth Circuit's approach to the question presented in *Duckworth*.

2. The Fourth Circuit's approach is also inconsistent with the statutory scheme, in two respects. To begin with, once a three-judge court has been called, Section 2284(b)(3) permits a single member of the court to decide routine matters on behalf of the panel. But it expressly forbids any single judge from deciding a request for an injunction or entering judgment on the

merits. Yet, under the *Duckworth* rule, a single-judge court may determine that "three judges are not required" when that single judge unilaterally concludes that the plaintiff has not raised a viable legal theory or is otherwise not entitled to relief. That undercuts the design of the statute, which otherwise requires injunctions and judgments on the merits to be decided by the full three-judge panel.

Second, an appeal from a decision not to convene a three-judge court must be taken to the court of appeals. But because Section 1253 vests this Court with exclusive jurisdiction to hear the merits of cases required to be heard by a court of three judges, the settled rule is that that the courts of appeals may not reach the merits in any case that they decide should have been referred to a three-judge court. That creates a jurisdictional Catch-22 in cases where the single-judge court refuses to convene a three-judge court by way of Rule 12(b)(6): In order for the court of appeals to reverse in any such case, it will necessarily have to reach the merits of the underlying claims. But by reversing on the merits, the court will paradoxically be depriving itself of jurisdiction to do just that. That makes nonsense of the jurisdictional scheme.

3. By tying jurisdiction to Rule 12(b)(6), *Duckworth* furthermore establishes the sort of complex jurisdictional test that this Court's precedents discourage. Rule 12(b)(6) permits the dismissal of arguable claims. A jurisdictional rule that, by its nature, turns on answers to debatable legal questions virtually guarantees protracted and inefficient litigation on the threshold question of which court is the right court to decide the merits of a complaint. Such uncertainty and inefficiency weighs strongly against the Fourth Circuit's approach.

4. The Fourth Circuit's approach in *Duckworth* also contradicts the statute's settled purposes. It has long been recognized that Congress enacted the three-judge court statute to ensure that particularly important cases enjoy the benefit of both careful consideration by three judges and speedy final resolution by direct appeal to this Court. Both purposes are thwarted by *Duckworth*, which allows single judges to determine the merits of such cases—often (as in this case) without especially careful reasoning—and routes appeals through the intermediate courts of appeals, which often slow final resolution by several years, especially when a case is reversed and remanded for a do-over before a three-judge court. That is not the outcome that Congress had in mind when it first passed the Three-Judge Court Act in 1910 or when it modernized the Act in 1976.

In sum, the Fourth Circuit's answer to the question presented is inconsistent with the statutory text, upsets the statutory scheme, ignores the rule against complex jurisdictional tests, and undermines the Act's settled purposes. It should be rejected.

B. The upshot is that Judge Bredar should have referred this case to a three-judge court. The only excuse for failing to do so would be a conclusion that the First Amendment claim stated in the complaint is wholly frivolous and inescapably foreclosed by this Court's precedents. It is nothing of the sort. In fact, the opposite is true: This Court's precedents lend substantial support to the First Amendment claim here. The entire action therefore should have been heard by a three-judge court.

ARGUMENT

THIS ACTION SHOULD HAVE BEEN REFERRED TO A THREE-JUDGE DISTRICT COURT

A. When the statutory requirements are otherwise satisfied, three judges are "not required" only when subject matter jurisdiction is found lacking

Section 2284(a) provides that a district court of three judges "shall" be convened when, as here, "an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body" or when "otherwise required by Act of Congress." 28 U.S.C. § 2284(a). When the plaintiff in a suit covered by Section 2284(a) files "a request for three judges," the single judge to whom the case is initially referred "shall, *unless he determines that three judges are not required*, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge * * * to hear and determine the action or proceeding." 28 U.S.C. § 2284(b)(1) (emphasis added).

The Fourth Circuit held, in *Duckworth* v. *State Administrative Board of Election Laws*, 332 F.3d 769, (2003), that if a plaintiff's "pleadings do not state a claim" under Rule 12(b)(6), according to the lower court, "then by definition they are insubstantial and so properly are subject to dismissal by the district court without convening a three-judge court." *Id.* at 772-773.

That holding cannot be squared with the statute's text, which must be interpreted against the backdrop of this Court's precedents. It also offends the statutory scheme, runs afoul the rule against complex jurisdictional tests, and disserves the settled purposes underlying the Three-Judge Court Act. This Court accord-

ingly should disapprove the rule announced in *Duckworth*, vacate the judgments of the lower courts, and remand with instructions to refer the entire complaint to a three-judge district court.

1. The statutory text forbids a single-judge district court from granting a Rule 12-(b)(6) motion to dismiss

At issue in this case is the meaning of the phrase "unless he determines that three judges are not required." 28 U.S.C. § 2284(b)(1). The question, more particularly, is whether one basis for determining that "three judges are not required" is that the complaint fails to state a claim under Federal Rule of Civil Procedure 12(b)(6). It is not.

a. As always, the "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 183 (2004). Here, the text of the statute clearly "identifies those situations in which the convening of a three-judge court is compulsory" (*Page* v. *Bartels*, 248 F.3d 175, 185 (3d Cir. 2001)): "A district court of three judges shall be convened when," among other things, "an action is filed challenging the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a).

The word "shall" "'indicates a command that admits of no discretion on the part of the person instructed to carry out the directive.'" *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 661 (2007) (quoting *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001)). Thus the text of the statute ostensibly requires that any complaint challenging the constitutionality of congressional redistricting be heard by a district court of three judges.

But like most things, it's not quite that simple.

Before Congress inserted the words "unless he determines that three judges are not required" in 1976 (28 U.S.C. § 2284(b)(1) (1978)), the 1948 version of the Three-Judge Court Act had similarly provided that a single-judge court shall convene a three-judge court only when the "action or proceeding" was one "*required* by Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. § 2284 (1970) (emphasis added). Likewise, Section 1253 allowed for an immediate appeal to this Court only in cases "*required* * * * to be heard and determined by a district court of three judges." 28 U.S.C. § 1253 (1970) (emphasis added).

Under that predecessor statute, this Court had established in detail when three judges were "required" and "not required." As relevant here, the Court had said that "[a] three-judge court is *not required* when the district court itself lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts." *Gonzalez*, 419 U.S. at 100 (emphasis added). Accord *Poresky*, 290 U.S. at 32 (the Three-Judge Court Act "does not require three judges to pass upon [the] initial question of jurisdiction").

As we have noted (*supra*, at 7), one settled basis for finding that the district court lacked jurisdiction was the determination that the federal claim was "insubstantial." *McLucas* v. *DeChamplain*, 421 U.S. 21, 28 (1975). See also, *e.g.*, *Hagans* v. *Lavine*, 415 U.S. 528, 540 (1974) (a claim can be "so insubstantial as to be beyond the jurisdiction of the District Court"). This Court accordingly held in *Bailey* that "Section 2281 does *not require* a three-judge court when the claim that a statute is unconstitutional is wholly insubstantial, legally speaking nonexistent." 369 U.S. at 33

(emphasis added). By 1976, that rule was beyond cavil. See *Goosby*, 409 U.S. at 518 (citing and quoting cases).[2]

The insubstantiality rule was well-developed by this Court's precedents: "A claim is insubstantial" in the jurisdictional sense "only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" *Goosby*, 409 U.S. at 518 (quoting *Poresky*, 290 U.S. at 32). "'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' 'wholly insubstantial,' 'obviously frivolous,' and 'obviously without merit.'" *Ibid.* (citations omitted).

The use of modifiers was not gratuitous; on the contrary, "[t]he limiting words 'wholly' and 'obviously,' have cogent legal significance." *Goosby*, 409 U.S. at 518. "In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions *inescapably render the claims frivolous*." *Ibid.* (emphasis added). Thus, as this Court observed later on, "constitutional claims will not lightly be found insubstantial for purposes of § 2281." *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 147-148 (1980).

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[2] Sometimes "[t]here is no sharp dichotomy * * * between jurisdictional and constitutional issues," as, for instance, with respect to standing. *Feinberg* v. *FDIC*, 522 F.2d 1335, 1342 (D.C. Cir. 1975). In such circumstances, when it is "impossible * * * to fully separate jurisdictional issues from constitutional ones," it may be appropriate for the single-judge court to refer the question of jurisdiction to the three-judge court. *Id.* at 1341.

Just as this Court's precedents made clear when single-judge courts *could* determine that three judges were not required, they also made clear when they could *not*. It was regarded as fundamental in 1976 that "failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell* v. *Hood*, 327 U.S. 678, 682 (1946). Thus, "[d]ismissal for lack of subject-matter jurisdiction because of the inadequacy of [a] federal claim is proper *only* when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (emphasis added) (quoting *Oneida Indian Nation of N.Y.* v. *County of Oneida*, 414 U.S. 661, 666 (1974).

The rationale for that rule is self-evident: "'Jurisdiction is not defeated by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.'" *Steel Co.*, 523 U.S. at 89 (quoting *Bell*, 327 U.S. at 682) (ellipses omitted). In fact, the opposite is true: A "court must *assume* jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief." *Bell*, 327 U.S. at 682 (emphasis added). Thus, the question whether the plaintiff has "fail[ed] to state a proper cause of action" is, per force, one that "the district court can decide only *after* it has assumed jurisdiction over the controversy." *Id.* at 682-684 (emphasis added).

For those reasons, "previous decisions that merely render claims of doubtful or questionable merit," even if sufficient to support dismissal under Rule 12(b)(6), cannot "render them insubstantial for the purposes of 28 U.S.C. § 2281." *Goosby*, 409 U.S. at 518. And "[o]nce

a federal court has ascertained that a plaintiff's jurisdiction-conferring claims are not 'insubstantial on their face,' 'no further consideration of the merits of the claim[s] is relevant to a determination of the court's jurisdiction of the subject matter,'" and the case must be referred to a three-judge court. *Hagans*, 415 U.S. at 542 n.10 (citations omitted) (quoting *Brotherhood of Locomotive Engineers* v. *Chicago, R.I. & P.R..*, 382 U.S. 423, 428 (1966); *Baker* v. *Carr*, 369 U.S. 186, 199 (1962)).

b. It was against that backdrop that Congress, in 1976, inserted the text at issue here: "Upon the filing of a request for three judges, the judge to whom the request is presented shall, *unless he determines that three judges are not required*, immediately notify the chief judge of the circuit" that a three-judge court should be convened. 28 U.S.C. § 2284(b)(1) (2012) (emphasis added).

The 1976 amendments must be understood as assigning the words "not required" the same meaning that they had been given by the precedents from which they were taken. When "Congress amend[s]" a statute, it is "presume[d] * * * [to do] so with full cognizance of the Court's [long-standing] interpretation of the prior statutes." *Ankenbrandt* v. *Richards*, 504 U.S. 689, 700 (1992). In using the words "not required" in Section 2284(b)(1), the 94th Congress is therefore "'presumed to [have been] aware of * * * the judicial interpretation'" of those words, and, absent "contrary indications," to have left that interpretation "undisturbed." *Marshall* v. *Marshall*, 547 U.S. 293, 307 (2006) (quoting *Ankenbrandt*, 504 U.S. at 700-701). Accord *Williams* v. *Taylor*, 529 U.S. 420, 434 (2000).

Here, there is no direction in the statutory text to give the words "not required" any meaning other than

one prevailing under this Court's precedents. The historical background thus indicates that Section 2284-(b)(1)'s text permits a single-judge court to "determine[] that three judges are not required" when it concludes that the complaint is constitutionally insubstantial,[3] but *not* when it merely fails to state a claim under Rule 12(b)(6).[4]

c. All of that spells doom for the Fourth Circuit's conclusion that "pleadings [that] do not state a claim" under Rule 12(b)(6) are "by definition * * * insubstantial" and thus "subject to dismissal by the district court without convening a three-judge court." *Duckworth*, 332 F.3d at 772-773.

There can be no mistaking the differences between a complaint that is "obviously frivolous" and a complaint that merely fails to state a claim. As this Court

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[3] We are unaware of any case in which this Court has expressly applied the substantiality prerequisite to the convocation of a three-judge court under the 1976 version of the Three-Judge Court Act. The courts of appeals, however, have uniformly recognized that insubstantiality remains a basis for refusing to convene a three-judge court. See, *e.g.*, *Kalson* v. *Paterson*, 542 F.3d 281, 287 (2d Cir. 2008); *Page* v. *Bartels*, 248 F.3d 175, 191 (3d Cir. 2001); *LaRouche* v. *Fowler*, 152 F.3d 974, 981 (D.C. Cir. 1998).

[4] Although this Court has cautioned against conflating merits issues with jurisdictional ones (see *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 510-513 (2006)) and "questioned" early on "[t]he accuracy of calling * * * jurisdictional" a dismissal for want of a substantial federal question (*Bell*, 327 U.S. at 683), it confirmed in *Arbaugh* that a complaint may be "dismissed for want of subject-matter jurisdiction if it * * * is 'wholly insubstantial and frivolous.'" 546 U.S. at 513 n.10 (quoting *Bell*, 327 U.S. at 682-683). In any event, the question here is one of statutory interpretation, which requires the text to be read consistent with what Congress understood the relevant words to mean at the time of enactment, including in light of this Court's then-prevailing precedents. *Ankenbrandt*, 504 U.S. at 700.

has explained in the context of 28 U.S.C. § 1915-(e)(2)(B)(i), which permits dismissals of "frivolous" *in forma pauperis* complaints, a dismissal on the ground of frivolousness is proper only when the complaint's claims are "clearly baseless," "fanciful," "fantastic," and "delusional." *Denton* v. *Hernandez*, 504 U.S. 25, 31-32 (1992). A complaint that merely "fails to state a claim under Federal Rule of Civil Procedure 12(b)(6)," is not necessarily any of those things, and, indeed, can "have 'an arguable basis in law.'" *Id.*, 504 U.S. at 31 (quoting *Neitzke* v. *Williams*, 490 U.S. 319, 327 (1989)).

Put another way, "[n]othing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable." *Neitzke*, 490 U.S. at 327. Thus, "[w]hen a complaint raises an arguable question of law which the district court ultimately finds is correctly resolved against the plaintiff, dismissal on Rule 12(b)(6) grounds is appropriate, but dismissal on the basis of frivolousness is not." *Id.* at 328 Cf. *Carr* v. *Tillery*, 591 F.3d 909, 917 (7th Cir. 2010) ("the dismissal of even a very weak case should be on the merits rather than because it was too weak even to engage federal jurisdiction").

Under the Fourth Circuit's approach, by contrast, there is "no material distinction" "between a complaint that 'does not state a substantial claim for relief' and the Rule 12(b)(6) standard." *Fletcher*, 831 F. Supp. 2d at 892 (quoting *Duckworth*, 332 F.3d at 773) (ellipses omitted). That unexplained conclusion ignores the legal context in which the 1976 amendments were enacted, conflating two concepts that this Court repeatedly has said are distinct.

2. *Duckworth* cannot be squared with the statutory scheme

If there were any lingering uncertainty that the Fourth Circuit's approach is inconsistent with the statute's text (and there should be none), it would be "clarified by the remainder of the statutory scheme." *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988). Here, the statutory structure confirms that our reading of the statute is correct, in two independent respects.

First, permitting single-judge courts to refuse to convene three-judge courts by granting Rule 12(b)(6) motions to dismiss would undercut Section 2284(b)(3)'s express division of responsibilities between single judges and three-judge panels.

In cases covered by Section 2284, subsection (b)(3) sets aside certain tasks for single judges to perform, while reserving the most important judicial functions for the full three-judge panel. It provides, for example, that in cases heard by three-judge courts, "[a] single judge may conduct all proceedings *except the trial*." 28 U.S.C. § 2284(b)(3) (emphasis added). And as relevant here, it provides that a single judge may "enter all orders permitted by the rules of civil procedure except" that "[a] single judge shall not * * * determine any application for a preliminary or permanent injunction" or "enter judgment on the merits." *Ibid.*

To make sense of that division of responsibilities, the statute must be read to *preclude* a single judge from refusing to convene a three-judge court on

grounds that only the three-judge panel would otherwise have the authority to decide. If a single-judge court could declare that "three judges are not required" because the single judge believes the complaint is meritless (though not frivolous), then Section 2284-(b)(3)'s exclusive allocation of authority to three-judge panels to "enter judgment on the merits" would be frustrated.

Of course, "[t]he constraints imposed by § 2284-(b)(3) on a single district judge's authority to act are not triggered unless the action is one that is *required*, under the terms of § 2284(a), to be heard by a district court of three judges." *Page* v. *Bartels*, 248 F.3d 175, 184 (3d Cir. 2001) (emphasis added).[5] But that is neither here nor there; a single-judge court undeniably "invade[s] the province of a three-judge court" when it "decide[s] the merits of the case, either by granting or by withholding relief." *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 718 (1962). A contrary conclusion—one permitting a single-judge court to find that three judges are "not required" because the single-judge court assumed for itself the power to decide the merits of the complaint—would undermine the division of authority set forth in Section 2284(b)(3).

Thus, when read in context, "with a view to [its] place in the overall statutory scheme," (*FDA v. Brown & Williamson*, 529 U.S. 120, 133 (2000)), the phrase "unless he determines that three judges are not required" cannot be read as permitting a single-judge court to dismiss an otherwise covered complaint for failure to state a claim under Rule 12(b)(6).

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[5] Judge Bredar missed that point, concluding (without explanation) that Section 2284(b)(3)'s limitations applied regardless of whether or not he determined that three judges were "required." Pet. App. 6a.

Second, permitting single-judge courts to grant Rule 12(b)(6) motions to dismiss would make Section 2284's scheme of appellate review irrational.

It is fundamental, in light of Section 1253's assignment of jurisdiction over appeals from judgments of three-judge district courts to this Court alone, that "a court of appeals [is] precluded from reviewing on the merits a case which should have originally been determined by a court of three judges." *Idlewild*, 370 U.S. at 715-716 (citing *Stratton*, 282 U.S. at 10). A "Court of Appeals [is] without jurisdiction to render * * * an adjudication of the merits" in such cases. *Goosby*, 409 U.S. at 522 n.8.

The *Duckworth* rule thus creates a jurisdictional Catch-22: Permitting a single-judge court to refuse to convene a three-judge court on Rule 12(b)(6) grounds will necessarily *require* the court of appeals to review the merits of the case, even when the court ultimately determines that the dismissal was erroneous and a three-judge court should have been convened. In all such cases, therefore, the court of appeals' decision on the merits (*qua* decision on jurisdiction) will paradoxically deprive it of jurisdiction to enter a decision on the merits. That makes no sense.

When a proposed interpretation of a statutory provision "would be inconsistent with—in fact, would overthrow—the Act's structure and design," that interpretation must be rejected. *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014). Just so here.

3. *Duckworth* offends the rule favoring clear jurisdictional tests

The jurisdictional complications created by the *Duckworth* rule do more than offend the statutory structure—they also ignore this Court's "rule favoring clear boundaries in the interpretation of jurisdictional

statutes." *Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1131 (2015) (citing *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010)).

Section 2284 is a jurisdictional statute: Single-judge district courts "lack jurisdiction to decide the merits of * * * question[s that] properly belong[] before a three-judge district court." *LaRouche* v. *Fowler*, 152 F.3d 974, 981 (D.C. Cir. 1998) (citing *Goosby*, 409 U.S. at 522 n.8). In addition to defining the jurisdictional lines between single- and three-judge courts, the statute also delineates the bounds of this Court's mandatory jurisdiction under Section 1253, for if the case is "not one 'required * * * to be heard and determined by a district court of three judges,'" within the meaning of Section 1253, "[it] cannot be brought here on direct appeal." *Bailey*, 369 U.S. at 34.

As this Court knows well, "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp.*, 559 U.S. at 94 (citing *Sisson* v. *Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in judgment)). "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Ibid.* "Judicial resources too are at stake" because "[c]ourts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it." *Ibid.* (citing *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 514 (2006)). "So courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Ibid.* (citing same).

By tying jurisdiction to Rule 12(b)(6), *Duckworth* establishes just the kind of "complex jurisdictional test" that this Court's precedents discourage. The frivolousness standard is relatively clear, turning on

the existence of Supreme Court precedents that inescapably foreclose the action. See *Carr*, 591 F.3d at 917 ("as a practical matter," the insubstantiality test requires that it be "clear beyond any reasonable doubt that a case doesn't belong in federal court"). That is a clear standard that allows the lower courts to "readily assure themselves of their power to hear a case." *Hertz Corp.*, 559 U.S. at 94.

The Rule 12(b)(6) standard, by contrast, permits the dismissal of claims that "have 'an arguable basis in law.'" *Denton*, 504 U.S. at 31 (quoting *Neitzke*, 490 U.S. at 327). The dismissal under 12(b)(6) of a complaint founded on a debatable legal theory hardly gives satisfactory assurance concerning jurisdiction. On the contrary, a jurisdictional rule that, as a matter of course, turns on answers to debatable legal questions virtually guarantees protracted litigation on the threshold question of "which court is the right court to decide" the merits of petitioners' complaint. *Hertz Corp.*, 559 U.S. at 94.

4. *Duckworth* contradicts the statute's settled purposes

The long-recognized purposes underlying the Three-Judge Court Act provide yet further reason to reject the *Duckworth* rule. Courts "cannot interpret federal statutes to negate their own stated purposes." *King* v. *Burwell*, No. 14-114, 2015 WL 2473448, at *12 (U.S. June 25, 2015) (quoting *N.Y. State Dep't of Social Servs.* v. *Dublino*, 413 U.S. 405, 419-420 (1973). That is just what the *Duckworth* rule does.

As we have explained (*supra*, at 4-5, 9), there are two well-recognized purposes underlying the present-day Three-Judge Court Act.

a. Three-judge district courts "allow a more authoritative determination and less opportunity for indivi-

dual predilection in sensitive and politically emotional areas." *Swift*, 382 U.S. at 119. "However much integrity, strength and good-will [single district judges] may have, they are—like all of us—affected by their environment in a host of unconscious and half-conscious ways." *Hearing on S. 271 and H.R. 8285*, at 123 (testimony of Prof. Anthony G. Amsterdam). "Statutory three-judge district courts are considerably more resistant to these local influences than [are] single district judge[s]" and ensure a "considered decision-making process" that acts as a check on "local pressures" and allows for "share[d] responsibility." *Ibid.* The evidence is thus clear that, with the Three-Judge Court Act, Congress "sought to assure more weight and greater deliberation by not leaving the fate of [important] litigation to a single judge." *Phillips* v. *United States*, 312 U.S. 246, 250 (1941). Permitting single judges to dismiss reapportionment cases on the merits under Rule 12(b)(6) is at cross-purposes with that goal.[6]

To be sure, a key rationale for requiring three judges was concern for the granting, not denying, of relief, driven by the belief that "no one Federal judge [should have the power to] *set aside* what the Congress has done or what the State legislature has done." *Hearings on S. 1876*, at 791 (testimony of Judge Wright) (emphasis added). But there is no reason to think that the same rationale does not apply inversely as well.

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[6] This purpose is confirmed by other enactments requiring litigation before three-judge district courts. See, *e.g.*, H.R. Rep. No. 88-914, at 2490-91 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2391 (concerning three-judge court review under the Voting Rights Act, noting that "[t]he balance and broad range of views that three judges can bring to bear upon a voting case should assure fewer instances of delay and a greater willingness to safeguard the individual's right to vote").

"Allegations of unconstitutional bias in apportionment are most serious claims" (*Vieth*, 541 U.S. at 311-312 (Kennedy, J., concurring)), and "[q]uestions regarding the legitimacy of the state legislative apportionment (and particularly its review by the federal courts) are highly sensitive matters" (*Page*, 248 F.3d at 190). No single judge should have the authority to scuttle a meritorious constitutional challenge involving such important claims. That much is confirmed by Congress's retention of the three-judge court procedure even in an era when "the three-judge district court, as compared to single district judges, [had become] *more* favorable to civil rights plaintiffs overall." Solimine, *Fate*, at 129 (emphasis added).

b. Of course, plaintiffs in such cases always have the benefit of appellate review before three-judge panels of the courts of appeals. But that only highlights the second statutory purpose undermined by the Fourth Circuit's answer to the question presented: "ensuring this Court's swift review." *Gonzalez*, 419 U.S. at 98.

This Court repeatedly has recognized that "the statute 'authorizes direct review by this Court * * * as a means of accelerating a final determination on the merits.'" *Gonzalez*, 419 U.S. at 96 (quoting *Swift*, 382 U.S. at 119). Accord, *e.g.*, *FEC* v. *Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 487 (1985) (the three-judge court procedure ensures "expedited review, and direct appeal to this Court" in cases that are "likely to be of great importance"). As Judge Friendly explained in his testimony before the 92d Congress, the speedy resolution of such challenges is "better accomplished by leaving out the court of appeals as an

intermediary that has to be pierced." *Hearings on S. 1876*, at 749 (1971).[7]

Yet a core concern prompting enactment of the present-day statute was the widespread view that the process of determining when a three-judge court is required undercut "the efficiency of our judicial system" by producing "duplicative" appeals. S. Rep. No. 94-204, at 7 (1976). *Duckworth* exacerbates that problem exponentially.

When a single judge grants a Rule 12(b)(6) motion to dismiss (as in this case), the result is likely to be years of litigation before the plaintiffs receive a final answer just on the threshold question of whether they are entitled to a hearing before a three-judge court. Rather than appealing immediately to this Court pursuant to Section 1253, the plaintiffs in such a case would have had to bring their appeal before the court of appeals—a process that, by itself, may add two or three years. See *Frequently Asked Questions*, U.S. Court of Appeals for the Ninth Circuit, perma.cc/4XWU-RZVK (average time from the notice of appeal to oral argument is 12-20 months, and from argument to decision, 3-12 months).

If the court of appeals affirms, briefing and decision on a petition for certiorari would take at least six months longer, to say nothing of the additional time required if certiorari is granted. And if the court of

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[7] This second purpose is likewise confirmed by more recent legislation. See, *e.g.*, 147 Cong. Rec. 5145 (2001) (statement of Sen. Hatch) (concerning three-judge court review under the Bipartisan Campaign Reform Act, arguing that there should be a "prompt and definite determination of the constitutionality of many of the bill's controversial provisions" and that it "is imperative that we afford the Supreme Court the opportunity to pass on the constitutionality of this legislation as soon as possible").

appeals or this Court reverses, the case goes back down to a three-judge court for the litigation to "start[] all over again." *Hearing on S. 271 and H.R. 8285*, at 5 (testimony of Hon. J. Skelly Wright). Only once the three-judge issues a subsequent decision on the merits would a direct merits appeal to this Court become available. It was precisely the point of the 1976 amendments to avoid such "duplicative" appeals. S. Rep. No. 94-204, at 7 (1976).

As Congress recognized when it preserved three-judge court review for redistricting cases, those concerns carry special weight in cases like this one, where delay may also frustrate the underlying purpose of the lawsuit. "[A] court order permitting a man to vote is a hollow victory, when the order is handed down after the election has been held and the votes counted." 110 Cong. Rec. 1536 (1964) (statement of Congressman McCulloch). Indeed, even in some cases where the decision comes down before the election, it may be too late for effective relief. See *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964).

Circumstances are not much better when a single judge *denies* a 12(b)(6) motion to dismiss. Once the case is referred to a three-judge court, the allocation of responsibility established by Section 2284(b)(3) kicks in, including the rule that "[a]ny action of a single judge may be reviewed by the full court at any time before final judgment" (28 U.S.C. § 2284(b)(3)) and that only the three-judge panel may "decide the merits of the case, either by granting or by withholding relief" (*Idlewild*, 370 U.S. at 715).

Thus, the first step that a defendant ordinarily will take in any case referred to a three-judge district court after the single-judge court denies the first motion to dismiss is to move *again* under Rule 12(b)(6), which, as

a decision on the merits, must be decided by the three-judge panel. That is just what happened in *Fletcher* v. *Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011). Although the three-judge court ruled relatively quickly on the second motion to dismiss, such duplicative litigation serves no useful purpose and guarantees pointless delay before entry of final judgment.

And the likelihood that the defendants' Rule 12-(b)(6) motion will be reargued and redecided introduces yet another complication: Under *Duckworth*, if the three-judge court overrules the single-judge court and grants the motion to dismiss, the upshot is that the three-judge court should not have been convened to begin with. From a decision of that sort, which requires the "the three-judge court [to] dissolve[] itself for want of jurisdiction" and remand to the single-judge court, "an appeal lies to the appropriate Court of Appeals and not to this Court." *Mengelkoch* v. *Indus. Welfare Comm'n*, 393 U.S. 83, 83-84 (1968).

Thus if *Duckworth* were the correct legal rule, this Court would have lacked jurisdiction to decide the merits in *Arizona State Legislature* v. *Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), and would lack jurisdiction to decide the merits in *Evenwel* v. *Abbott* (No. 14-940) this Term, because in each of those cases, the three-judge district court granted the defendants' motion to dismiss. Yet it should go without saying that those are exactly the kind of important, time-sensitive cases requiring prompt resolution by this Court.

In sum, the *Duckworth* rule is insupportable. It is out of line the statute's text, structure, and purposes, and with nearly a century of this Court's precedents. It must be rejected.

B. A three-judge district court was required in this case

Because the *Duckworth* rule is wrong and petitioners have presented a non-frivolous First Amendment claim, the complaint should have been referred to a three-judge court.

1. There is little doubt that a political gerrymander can violate the Constitution. As this Court has explained, "each political group in a State should have the same chance to elect representatives of its choice as any other political group," and "'[d]iluting the weight of votes because of place of residence impairs basic constitutional rights.'" *Davis* v. *Bandemer*, 478 U.S. 109, 124 (1986) (plurality) (quoting *Reynolds* v. *Sims*, 377 U.S. 533, 566 (1964)).[8] More broadly, the Elections Clause is "'a grant of authority to issue procedural regulations, and not * * * a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.'" *Cook* v. *Gralike*, 531 U.S. 510, 523 (2001) (quoting *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 833-834 (1995)).

Among the constitutional constraints that lawmakers may not evade are those imposed by the First Amendment. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Elrod* v. *Burns*, 427 U.S. 347, 356 (1976). Thus "First Amendment concerns arise where a State enacts a law that has the purpose and effect of sub-

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[8] The plurality in *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004), did not disagree that "severe partisan gerrymanders [can] violate the Constitution" or "an excessive injection of politics [in redistricting] is unlawful." *Id.* at 292-293 (emphasis omitted). It concluded, instead, that "it is [not] for the courts to say when a violation has occurred." *Id.* at 292.

jecting a group of voters or their party to disfavored treatment by reason of their views." *Vieth* v. *Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment).[9]

That observation finds substantial support in this Court's precedents. If a burden were imposed on citizens "because of [their] constitutionally protected speech or associations," this Court has said, "[their] exercise of those freedoms would in effect be penalized and inhibited." *Elrod*, 427 U.S. at 359. Thus, "[a] burden that falls unequally on [particular] political parties, * * * impinges, by its very nature, on associational choices protected by the First Amendment." *Anderson* v. *Celebrezze*, 460 U.S. 780, 793 (1983).

It follows that citizens enjoy a First Amendment right not to be "burden[ed] or penaliz[ed]" for their "voting history," "association with a political party," or "expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in judgment) (citing *Elrod*, 427 U.S. at 347 and *Cal. Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000)). "In the [specific] context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights." *Ibid.* And "[i]f a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their

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[9] Justice Kennedy's concurring opinion in *Veith* must be understood as controlling under *Marks* v. *United States*, 430 U.S. 188 (1977). See *Alperin* v. *Vatican Bank*, 410 F.3d 532, 552 n.13 (9th Cir. 2005); *Perez* v. *Perry*, 26 F. Supp. 3d 612, 623 n.6 (W.D. Tex. 2014); *Ala. Leg. Black Caucus* v. *Alabama*, 988 F. Supp .2d 1285, 1295 (M.D. Ala. 2013). Judge Bredar largely ignored this point, treating the plurality opinion as binding and describing it as having "reversed *Bandemer*." Pet. App. 15a.

views, there would likely be a First Amendment violation, unless the State shows some compelling interest." *Id.* at 315.

The federal courts are well equipped with a range of manageable standards to enforce that commonsense rule. This Court's First Amendment retaliation doctrine, for example, maps naturally onto the problem of political gerrymandering, which itself works as a kind of retaliation for citizens' voting histories and political-party affiliations.

According to the familiar *Pickering* balancing test, courts must "arrive at a balance between the interests" of individuals in the exercise of core First Amendment rights and of the State in the performance of its necessary public functions. *Pickering* v. *Bd. of Educ.*, 391 U.S. 563, 568 (1968).[10] Such a balancing test gives leeway to recognize that the "government must play an active role in structuring elections," and "[e]lection laws will invariably impose some burden upon individual voters." *Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992). Cf. *Gaffney* v. *Cummings*, 412 U.S. 735, 752 (1973) ("It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it.").

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[10] The States' role with respect to federal elections calls for the exercise not of their reserved power under the Tenth Amendment, but of the limited grant of authority under Article I, Section 4 of the Constitution. Whereas Section 2 of that Article mandates that representatives be elected directly "by the People of the several States," Section 4 assigns the States the limited responsibility to establish procedural regulations for holding those elections. It is not a "source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints" (*U.S. Term Limits*, 514 U.S. at 833-834), including the First Amendment.

But by analogy, it also requires that, when citizens' voting histories and party affiliations are shown to be a "substantial or motivating factor" in the drawing of particular district lines (*Board of Cnty. Comm'rs* v. *Umbehr*, 518 U.S. 668, 675 (1996)), the State must come forward with "an adequate justification" for the lines it has drawn (*Garcetti* v. *Ceballos*, 547 U.S. 410, 418 (2006)). After all, "'[d]iluting the weight of votes because of place of residence'" to ensure that an identifiable political group has "an insufficient chance to elect a representative of its choice" surely "impair[s] basic constitutional rights" (*Bandemer*, 478 U.S. at 124) and demands an explanation that comports with the Constitution.[11] Cf. *League of Women Voters of Florida* v. *Detzner*, No. SC14-1905, 2015 WL 4130852, at *2 (Fla. July 9, 2015) ("Once a direct violation of the Florida Constitution's prohibition on partisan intent in redistricting was found, the burden should have shifted to the Legislature to justify its decisions in drawing the congressional district lines.").

2. Just such a theory of First Amendment injury is alleged in the pro se complaint in this case. Petitioners

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[11] A *Pickering*-balancing approach bears some resemblance to this Court's approach to ballot-access cases, which "focus[es] on the degree to which the challenged restrictions operate" to "unfairly or unnecessarily burden[] the 'availability of political opportunity.'" *Clements* v. *Fashing*, 457 U.S. 957, 964 (1982) (quoting *Lubin* v. *Panish*, 415 U.S. 709, 716 (1974)). Regardless of which test applies, a sliding-scale approach avoids the dilemma that, "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest * * * would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433. Contra *Vieth*, 541 U.S. at 294 (plurality) ("[A] First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting.").

claim specifically that Maryland's redistricting plan burdens their First Amendment rights "along the lines suggested by Justice Kennedy in his concurrence in *Vieth*." Opp. App. 44 (¶ 23). Thus, "the structure and composition of the abridged sections" of various districts "constitute infringement of First Amendment rights of political association." *Id.* at 31 (¶ 5).

This Court has warned that "constitutional claims will not lightly be found insubstantial for purposes of § 2281." *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 147-148 (1980). Thus, "claims are constitutionally insubstantial only if the prior decisions *inescapably render the claims frivolous*; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281." *Goosby*, 409 U.S. at 508 (emphasis added). Far from foreclosing petitioners' First Amendment claim, this Court's precedents lend powerful support to it. At a bare minimum, the claim's viability is arguable.

Neither Judge Bredar nor the court of appeals cited a single decision of this Court suggesting otherwise. That being so, Judge Bredar erred by refusing to call for a three-judge court.

Because Section 2284(b) applies to the entire "action" and not individual claims, moreover, a three-judge court was required to consider "all of [petitioner]s' claims." *Lake Carriers' Ass'n* v. *MacMullan*, 406 U.S. 498, 504 n.5 (1972). See Petn. 29 n.12; accord *Page*, 248 F.3d at 187-188 ("the entire case, and not just [certain] claims, must be heard by a three-judge court"). The Court accordingly should vacate the judgments of both the court of appeals and the district court and remand with instructions to convene a three-judge court to consider petitioners' entire complaint.

CONCLUSION

The judgments of the court of appeals and district court should be vacated for lack of jurisdiction, and the case should be remanded with instructions to refer the complaint to a three-judge district court.

Respectfully submitted.

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